MALAYAN INSURANCE (M) SDN. BHD.

v.

ASIA HOTEL SDN. BHD.

SUPREME COURT, JOHOR BAHRU
GEORGE SEAH SCJ
HASHIM YEOP SANI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 221 OF 1986]
18 DECEMBER 1986

CIVIL PROCEDURE: *Appeal against summary judgment - Claim under fire insurance policies - Trial Judge concluded no merit or triable issues - Pure question of law if facts are undisputed and clear - Where O. 14 provision should be applied.*

This was an appeal by the defendant/appellant against an O. 14 judgment to the plaintiff/respondent. The plaintiff's claim was in respect of two Fire Insurance Policies which were in currency when the premises insured were severely damaged by fire. The trial Judge concluded that there was no merit or triable issue in the defence. The defendant/appellant appealed to the Supreme Court.

Held:

[1] The Appellate Court should not regard the appeal as a reviewing of the exercise of the Judge's discretion but should in practice approach the appeal as a rehearing.

[2] The Court hearing an O. 14 application should work within the framework of O. 14 and not under O. 33 r. 2.

[3] Where the issue raised is solely a question of pure law and simple undisputed facts the Court should exercise its duty under O. 14 and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the Court, after considering the argument, is satisfied that it is really unarguable then the Court should grant summary judgment.

[4] The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment.

[Appeal allowed with costs. Direction that trial be before another Judge.]

Cases referred to:

National Company for Foreign Trade v. Kayu Raya Sdn. Bhd. [1984] 1 CLJ (Rep) 283
European Asian Bank v. Punjab and Sind Bank [1983] 2 All ER 508
Cow v. Casey [1949] 1 All ER 197, [1947] 1 KB 474

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 33, r. 2

For the appellant - Khoo Eng Chin; M/s. Khoo & Sidhu
For the respondent - Zainal Azim; M/s. Azim, Ong & Krishnan

JUDGMENT

Hashim Yeop Sani SCJ:

This is an appeal against the order of the Judge under O. 14 of the Rules of the High Court. The Judge is his grounds of judgment determined what he thought was the sole question of law before granting summary judgment. He said (at p. 11) that the only dispute was non-disclosure of material facts by the plaintiffs on the proposal for insurance. He concluded that there was no merit or triable issue in the defence and granted interlocutory judgment with damages to be assessed at a later date.

To appreciate fully the situation involved it is desirable to go into the background facts in some detail. The writ was taken out on 19 January 1986 and the claims were under a policy of insurance *vide* Fire Insurance Policy No. 6/01/0086/0183 dated 25 January 1985 for the sum of RM328,000 and a consequential Loss Policy No. 6/02/002/02/83 dated also 25 January 1985 for the sum of RM329,000 in respect of rentals, profits and salaries. It would appear that on 11 May 1985 during the currency of both policies the premises insured were severely damaged by fire.

The statement of defence was filed on 10 March 1986 which denied liability. In para. 4 of the statement of defence the terms and conditions contained in both the policies were put in issue. The paragraph reads as follows:

> 4. With regard to para. 3 of the statement of claim, the defendants contend and will contend that their liability to make any payment to the plaintiffs under the said fire and consequential loss policies is subject to the terms and conditions contained therein or endorsed or otherwise expressed thereon.

Paragraph 12 of the statement of defence also raised the issue of misrepresentation and/or non-disclosure or concealment of a material fact.

The Counsel who appeared before us for the respondent/plaintiff at the hearing of this appeal was not the same Counsel who represented the plaintiff at the hearing in the High Court. He submitted to us that the facts of the case were not disputed and that the High Court Judge decided on the question of law on the basis of the undisputed facts. In his grounds of decision the Judge stated that the parties did not dispute the facts. But he did not set out clearly the relevant facts which the parties had agreed to and on the basis of which he was asked to decide on the question of law. Besides, the Judge went on to state: "The only dispute by the defendant is non-disclosure of material facts by the plaintiff in the proposal for insurance from Exhibit CLS 1". He did not state whether he was asked by the parties to determine any question of fact from the affidavits without hearing further evidence. The record does not show whether Counsel for the defendant confirmed or denied that facts were undisputed. Under the circumstances no one can really say whether the parties had agreed on all the relevant facts.

The approach to be taken by an appellate Court in an O. 14 appeal has been settled. The first principle is that the appeal Court should not regard the appeal as a reviewing of the exercise of the Judge's discretion but should in practice approach the appeal as a rehearing. This principle is already accepted by this Court in *National Company for Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 1 CLJ (Rep) 283 which was also an O. 14 appeal where this Court considered and followed *European Asian Bank v. Punjab and Sind Bank* [1983] 2 All ER 508.

What is involved in the present appeal is the other principle considered in *European Asian Bank* by Goff LJ (as he then was) that is, what happens when a legal issue is raised by the defence in an O. 14 application. In this regard several principles are involved. Firstly, the

Court hearing an O. 14 application should work within the framework of O. 14 and not to embark in an exercise under O. 33 r. 2 which empowers the Court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before trial of the cause or matter. Order 33 r. 2 is entirely for a different purpose. Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the Court should exercise its duty under O. 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the Court after considering the argument is satisfied that it is really unarguable then the Court should grant summary judgment.

In *Cow v. Casey* [1949] 1 All ER 197 the legal question contended by the defence to be reasonably arguable was the point of law on subtenancy and the protection of the Rent Restriction Acts. Lord Greene MR said at p. 481:

> If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the Court has precisely the same duty under O. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the Court is satisfied that it is really unarguable, the Court has the duty to apply the rule, and, in my opinion, the Master was perfectly right, the Judge was perfectly right, and the appeal should be dismissed.

Referring to *Cow v. Casey* Goff LJ if *European Asian Bank* said at p. 516 on the functions of the appellate Court:

> But where the appeal raises a question of law, this Court may be more ready to interfere. Moreover, at least since *Cow v. Casey* [1949] 1 All ER 197, [1949] 1 KB 474, this Court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O. 14, even if the question of law is at first blush of some complexity and therefore takes `a little longer to understand'. It may offend against the whole purpose of O. 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the Court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a Judge, with the possibility of yet another appeal.

It should be noted however that Goff LJ was cautious in his language when he said where **"a clear-cut issue"** is raised and **"when full argument has been addressed to the Court".** For it may offend the purpose of O. 14 for the Court not to decide a case which raises a clear-cut issue of law and when the Court has the benefit of full argument. We alluded earlier to the issues raised in para. 4 and 12 of the statement of defence which in our view are factors making this case not an appropriate one for summary judgment.

The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

We accordingly allowed the appeal and also directed the trial to be before another Judge.

Costs to the appellants here and below. Despite to be refunded to the appellants.

Also found at [1987] 1 CLJ 246